

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NATHANIAL DAWAYNE LEE,

Defendant-Appellant.

UNPUBLISHED

July 27, 2010

No. 290763

Berrien Circuit Court

LC No. 2008-404822-FH

Before: FORT HOOD, P.J., and BORRELLO and STEPHENS, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted a portion of the sentence imposed on his plea-based conviction of domestic violence, third offense, MCL 750.81(4). On December 15, 2008, the trial court sentenced defendant to 210 days in jail, and to pay \$1,820 in costs, fines, and attorney fees. For the reasons set forth in this opinion, we affirm in part, and dismiss the remainder of defendant's appeal as moot. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant pleaded guilty to assaulting his girlfriend on August 6, 2008, during an argument. The trial court sentenced defendant to 210 days in jail, with credit for 101 days previously served. The trial court also ordered defendant to pay \$1,820 in costs, fines, and attorney fees, stating:

You're also to pay a fine of \$400, cost of \$1000, state cost of \$60, victim rights fee of \$60 and attorney fee of \$300. The total is \$1,820 or 365 days in jail.

This Court granted defendant's delayed application for leave to appeal.

On appeal, defendant first argues that the trial court erred when it sentenced defendant to an additional 365 days in jail as an alternative to the payment of costs and attorney fees. He maintains that the trial court's decision was erroneous because any incarceration imposed over 12 months must be a prison sentence. He also argues that the order was improper because it acted as a denial of his equal protection and due process rights. Defendant further argues that the trial court erred when it imposed attorney fees and court costs without specifically determining defendant's ability to pay those fees and costs.

We note that defendant did not object to the trial court's imposition of a fine, court costs, and attorney fees; nor did he object to the imposition of an "alternate" jail sentence for nonpayment of these costs and fees. Accordingly, we review defendant's unpreserved issues for plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

According to plaintiff, defendant was released from his term of incarceration, through a jail reduction, on February 22, 2009, after having served 169 days in jail, which included his 101 days of prior credit. Our Clerk's Office has confirmed this information. Thus, as to the questions of whether the trial court erred when it ordered additional jail time as an alternative punishment to payment of fees and costs during sentencing, and whether the trial court erred when it imposed costs without determining defendant's ability to pay, we cannot fashion a remedy. Therefore, we dismiss these portions of defendant's appeal as moot. See *People v Rutherford*, 208 Mich App 198, 204; 526 NW2d 620 (1994). In addition, at the time of his release, defendant owed a total of \$1,820 in fines and costs. Of that amount, \$1,400 was waived. Defendant still owes \$420, consisting of a \$60 crime victim's rights fee, \$60 of state fees, and \$300 in attorney fees, but as of this date, defendant has not brought to the attention of this Court any effort to enforce the collection of these fees. His complaint concerning the imposition of \$1000 in court costs is likewise moot,¹ as those costs have been waived.

As to the imposition of attorney fees, defendant bases his assertion of error on this Court's decision in *People v Dunbar*, 264 Mich App 240; 690 NW2d 476 (2004), which held that before ordering reimbursement for a court-appointed attorney, a trial court must state on the record its presentence determination that the defendant has a foreseeable ability to pay the fee. However, in *People v Jackson*, 483 Mich 271; 769 NW2d 630 (2009), our Supreme Court overruled *Dunbar*. The *Jackson* Court held that an ability-to-pay assessment is only constitutionally necessary when the order for payment is actually enforced and a defendant contested his ability to pay. *Jackson*, 483 Mich at 275, 290-292. Then, when a trial court attempts to enforce its earlier imposition of a fee for a court-appointed attorney under MCL 769.1k, the defendant must be advised of this enforcement action and be given an opportunity to contest the enforcement on the basis of his then-existing indigency. The trial court must then evaluate "whether a defendant is indigent and unable to pay *at that time* or whether forced payment would work a manifest hardship on the defendant *at that time*." *Id.* at 293 (emphasis in original).

Here, because defendant does not contest the amount of the reimbursement imposed, his challenge to the order is premature. To the extent that defendant's claim of error rests on a general claim of indigency at the time of sentencing, the trial court did not err. Because the trial court has not sought enforcement proceedings against defendant as to the attorney fees assessed,

¹ Defendant has not challenged the imposition of the \$60 crime victim's rights fee or the \$60 of state fees.

defendant has not shown that he is entitled to relief. Instead, defendant should be permitted to object to the enforcement of any post-trial order to enforce the attorney fee recoupment order.²

Affirmed in part, dismissed as moot in part.

/s/ Karen M. Fort Hood
/s/ Stephen L. Borrello
/s/ Cynthia Diane Stephens

² Because the issues raised by defendant may arise again if and when enforcement proceedings commence concerning the attorney fees imposed, we note that the trial court should consider the premise outlined in *People v Collins*, 239 Mich App 125, 135-136; 607 NW2d 760 (1999), concerning the prohibition on incarceration based solely on a defendant's inability to pay. See also *Tate v Short*, 401 US 395, 397-400; 91 S Ct 668; 28 L Ed 2d 130 (1971); *People v Baker*, 120 Mich App 89, 99; 327 NW2d 403 (1982).